



Serving the Iowa Legislature

IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

June 15, 2012

2012 Interim No. 1

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Thursday, June 28, 2012

Studies Committee of the Legislative Council

10:00 a.m., Room 22, Statehouse

Service Committee of the Legislative Council

10:30 a.m., Room 22, Statehouse

Legislative Council

11:00 a.m., Room 22, Statehouse

Tuesday, July 10, 2012

Administrative Rules Review Committee

9:30 a.m., Room 116, Statehouse

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Iowa Legislative Interim Calendar and Briefing is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566.

AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Studies Committee of the Legislative Council

Chairperson: Senator Amanda Ragan

Vice Chairperson: Representative Kraig Paulsen

Location: Room 22, Statehouse

Date & Time: Thursday, June 28, 2012, 10:00 a.m.

Legislative Services Agency Contact: Richard Johnson, Legal Services, (515) 281-3566.

Agenda: Make recommendations for legislative interim studies.

Internet Page: <http://www.legis.state.ia.us/aspx/Committees/Committee.aspx?id=49>

Service Committee of the Legislative Council

Chairperson: Senator Michael Gronstal

Vice Chairperson: Representative Kraig Paulsen

Location: Room 22, Statehouse

Date & Time: Thursday, June 28, 2012, 10:30 a.m.

Legislative Services Agency Contacts: Glen Dickinson, Legislative Services Agency, (515) 281-3566; Richard Johnson, Legal Services, (515) 281-3566.

Agenda: Consider and make recommendations concerning budget and personnel matters of the Legislative Services Agency and the Office of the Citizens' Aide/Ombudsman.

Internet Page: <http://www.legis.state.ia.us/aspx/Committees/Committee.aspx?id=48>

Legislative Council

Chairperson: Representative Kraig Paulsen

Vice Chairperson: Senator Michael Gronstal

Location: Room 22, Statehouse

Date & Time: Thursday, June 28, 2012, at 11:00 a.m.

Legislative Services Agency Contacts: Glen Dickinson, Legislative Services Agency, (515) 281-3566; Richard Johnson, Legal Services, (515) 281-3566.

Agenda: Consider reports from Legislative Council committees.

Internet Page: <http://www.legis.state.ia.us/aspx/Committees/Committee.aspx?id=43>

Administrative Rules Review Committee

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

Location: Room 116, Statehouse

Date & Time: Tuesday, July 10, 2012, 9:30 a.m.

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Agenda: Published in the Iowa Administrative Bulletin:

<http://www.legis.state.ia.us/aspx/BulletinSupplement/bulletinListing.aspx>

ADMINISTRATIVE RULES REVIEW COMMITTEE

May 8, 2012

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

IOWA CAPITAL INVESTMENT BOARD, Verification of Tax Credits for Investment in Fund of Funds, 04/04/12 IAB, ARC 0077C, NOTICE; also ARC 0076C FILED EMERGENCY.

Background. These amendments provide for the information needed by the board to verify the amount of tax credits to be issued related to investments in a Fund of Funds ("Fund") organized by the Iowa Capital Investment Corporation. The amendments also extend the time from 10 days to 30 days for the board to verify the tax credit, provide additional clarification on the maturity date to be used when verifying the credits, and provide clarification of certain definitions. It was previously reported to the committee that several out-of-state financial institutions had commenced litigation in Polk County District Court to overturn these proposals. The district court judge ruled against the banks on all points relating for a request for a temporary injunction; however, at least two actions are still before the district court.

Commentary. Representatives from the board and the Department of Revenue explained the rulemaking and then offered background information on the lawsuits over these amendments. They stated that a loan via the fund was made to a bank, and the loan was to come due in April 2012. In March, internal discussions among the department and the board regarding the fund led to the conclusion that the board would need further information in order to verify the amount of tax credits relating to this loan which would be issued to the bank through the fund. These amendments were then adopted in order to clearly state what information would be required by the board when the loan comes due in order to approve the tax credits. The amendments were adopted on an emergency basis because the loan in question was to come due soon. The representatives stated that these amendments act only as a clarification of the terms of the loan contract regarding what information must be provided for verification, and serve to protect taxpayers by increasing transparency in these tax credits. They also stated that the effect of this rulemaking is to make the applicable rules match what the terms of the contract already require.

An attorney representing a bank opposing this rulemaking offered public comment. He stated that the bank objects to these amendments because they represent not a clarification, but changes in the terms of a contract between the bank and the state which are to the bank's detriment and which were done unilaterally and without the bank's consent. He stated that these amendments are also vague and overbroad. For these reasons, the bank has filed suit over this rulemaking. He further stated that a unilateral change in the terms of a state contract sends the wrong message to businesses who contract with the state.

In response to a question from committee members, it was clarified that the contract between the state and the bank consists of the tax credit certificate underlying this loan. Committee members asked if these amendments are intended to apply retroactively to the contract at issue, and representatives of the board and the department stated that was the explicit intent of this rulemaking.

Committee members asked what the effect is of a rules change which has some bearing on a state contract, presuming that such an occurrence is not unprecedented. A private attorney representing the department replied that the contract is by its own terms explicitly subject to state rules, which implies a right to modify applicable rules.

In response to questions from committee members, the representatives of the board and the department stated that this rulemaking was undertaken in light of what they described as "stonewalling" on the part of the bank in response to efforts by the board and the department to obtain information from the bank necessary for verification. The attorney for the bank denied that any stonewalling has occurred, and stated that the bank was in favor of transparency in this process and had provided the board and the department with all necessary information and would continue to do so. The representatives disputed that the necessary information had been provided. The attorney for the bank further stated that any problems in obtaining additional information regarding the loan may be the responsibility of the entities to whom the bank made loans from the funds it received, rather than the bank's responsibility. Both sides affirmed to the committee their desire to find a good resolution to this dispute.

Action. No action taken.

HISTORICAL DIVISION, Archeological Site Survey, 02/22/12 IAB, ARC 0104C, NOTICE.

Background. The State Historic Preservation Office (SHPO) receives an annual federal grant which requires compliance with the federal law. As part of those requirements, any entity receiving federal funds must make a reasonable and good-faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.

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(Administrative Rules Review Committee continued from Page 3)

Rural electric cooperatives contended these surveys can be expensive, and impose needless delays; in response the General Assembly enacted Iowa Code §303.18 in 2011, which modifies this requirement for rural electric cooperatives and municipalities.

Commentary. Under the new statute, the SHPO can only recommend that a rural electric cooperative or a municipal utility constructing electric distribution and transmission facilities for which it is receiving federal funding conduct an archeological site survey when the SHPO has determined that a historic property is likely to exist. The SHPO cannot require a level of archeological identification effort which is greater than the reasonable and good-faith effort required by the federal law.

The rules provide that the recommendations and decisions of the SHPO are subject to the review and approval of the Director of the Department of Cultural Affairs, and an appeal process is provided. Opponents contend that the director should not have final authority to overrule the SHPO.

Action. No action taken, further review on final adoption.

INSURANCE DIVISION, Certificates of Insurance for Commercial Lending Transactions, 04/04/12 IAB, ARC 0070C, NOTICE.

Background. These proposed rules were initially reviewed at the April Administrative Rules Review Committee meeting because they will be implemented on an "emergency" basis before the May meeting.

Commentary. The rules clarify what information a regulated insurance company may provide its customer in connection with a commercial real estate transaction between the customer and a lender. The rules relate to the situation where a lender requires a certificate of insurance on commercial real estate, and what can properly be placed in that certificate.

Action. No action taken.

Secretary, ex officio: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Staff: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

LEGAL UPDATE

Purpose. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

LEGAL UPDATE—OPEN RECORDS VIOLATIONS AND ATTORNEY FEES

Filed by the Iowa Supreme Court

November 18, 2011

City of Riverdale v. Dierks et al.

No. 09-1670

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20111118/09-1670.pdf

Background. The original action in the case was based upon the issue of whether the defendants were entitled to view security camera video (a City record) of a confrontation that occurred in the city clerk's office between the mayor and the defendants over prior records requests made by the defendants in previous years. The mayor of Riverdale (City) had been advised by a city attorney that the video was subject to disclosure and the mayor subsequently allowed a newspaper reporter to view the video. Despite this, the mayor did not allow the video to be disclosed to the defendants after the security firm that installed the video camera advised against disclosure for security reasons and, on the advice of another attorney, the mayor filed a declaratory judgment action to determine the City's obligations under Iowa Code chapter 22. The trial court ordered the City to turn over a copy of the videotape and awarded the defendants attorney fees. The Court of Appeals reversed the district court and vacated the attorney fee award because the district court failed to make a finding of bad faith on the part of the City.

Issue. The Supreme Court (Court) considered the issue of what the appropriate standards are for an award of attorney fees for a violation of Iowa Code chapter 22.

BRIEFINGS

INFORMATION REGARDING RECENT ACTIVITIES

(Legal Update—Open Records Violations and Attorney Fees continued from Page 4)

Analysis. The Court began its analysis with an overview of Iowa's open records law (Iowa Code chapter 22) with an emphasis on the award of attorney fees as "an incentive for private enforcement of the public disclosure obligations of government officials." Iowa Code §22.10 allows for civil lawsuits by citizens to enforce the statute as well as declaratory judgment actions by lawful custodians to determine whether a government record can legally be released. The defendants argued that the City violated Iowa Code chapter 22 when it did not allow the release of the video and, pursuant to Code §22.10, that the Court is required to award reasonable attorney fees to a citizen who proves a violation of Iowa Code chapter 22 has occurred. The City's defense relied on Iowa Code §22.8 in arguing that a good-faith, reasonable delay by the City, due to the filing of a declaratory injunction action to determine whether the City record is public or confidential, is not a violation of the law.

Good-faith, Reasonable Delay Defense. The Court noted that its review in this case was complicated by the fact that although the district court did not expressly reject the City's defense of a "good-faith reasonable delay," the district court did state that it "made no specific finding of bad faith." The Court found that a finding of a violation of Iowa Code chapter 22 is inconsistent with a finding of good-faith, reasonable delay. The Court thus assumed the district court "implicitly rejected the City's good-faith defense" and also "implicitly found the facts necessary to support the attorney fee award, including that the City did not litigate in good faith." This assumption was also supported by the fact the City failed to file a motion to enlarge or amend the findings for a specific finding on good-faith, reasonable delay on the part of the City. The Court encouraged district courts adjudicating attorney-fee claims under Iowa Code chapter 22 to make an express finding whether a delay in allowing public release of a government record was reasonable and in good faith.

Advice of Counsel Defense. The Court also considered whether the record supported the district court's implicit rejection of the City's good-faith defense notwithstanding the City's argument that it relied on the advice of legal counsel. The City argued that its reliance on counsel advice supports its good-faith, reasonable delay defense as a matter of law. The Court rejected this argument, finding that advice of counsel is only a factor to consider in determining whether a party acted in good or bad faith. The Court based this finding on the facts in this case that the City had received conflicting legal advice and had engaged in "selective disclosure" as it was "untenable for Riverdale to play the video for a reporter covering the dispute between the parties and yet withhold the same video from the defendants who requested it." Such disclosure in a situation like this waived any confidentiality claim. The Court noted that the correct legal advice in this situation would have been to produce the video to the defendants, rather than have the issue in litigation for a 16-month period.

Holding. The Court vacated the decision of the Court of Appeals and affirmed the district court's award of attorney fees. The Court remanded the case to the district court for a determination of the defendants' reasonable appellate attorney fees.

Enforcement of Open Records and Public Meetings Laws in Iowa—Update. 2012 Iowa Acts, SF 430 established the Iowa Public Information Board to provide an alternative means by which an aggrieved person may secure compliance with and the enforcement of open records and public meetings requirements under Iowa law. As of July 1, 2013, the board will have the authority to provide complainants informal assistance and mediation and settlement services, as well as preside at contested cases brought before the board. The board will have the authority to conduct formal investigations, issue subpoenas, issue orders with the force of law, and impose civil penalties and other remedies for violations of the open records and public meetings laws.

LSA Monitor: Rachele Hjelm, Legislative Services Agency, Legal Division, (515) 281-8127.

LEGAL UPDATE—COMMON LAW ACTION FOR FRAUD BASED ON MISREPRESENTATION OF PATERNITY

Filed by the Iowa Supreme Court

June 1, 2012

Dier v. Peters

No. 11-1581

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20120601/11-1581.pdf

Factual Background. O.D. was born to Cassandra Jo Peters. Peters told Joseph O. Dier that he was the child's biological father. Based upon this representation, Dier voluntarily provided monetary support for the child and Peters. Dier filed a petition for custody of the child and upon receiving the report of the child custody evaluator, Peters requested a paternity test. The test excluded Dier as the biological father and Dier requested a second paternity test which

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(Legal Update—Common Law Action for Fraud Based on Misrepresentation of Paternity continued from Page 5)

confirmed the initial test results. Dier filed a petition seeking reimbursement from Peters for monies expended for Peters, the child, and for the custody litigation on the basis of “paternity fraud.” Peters filed a motion to dismiss the petition on the grounds that the petition failed to state a claim upon which relief can be granted because the State of Iowa does not recognize an action for “paternity fraud” and the legislature has not created any such action by statute. Dier filed a resistance to the motion arguing that Peters had engaged in fraudulent activity. The district court granted Peters’ motion to dismiss, concluding that the current status of the law demands that the case be dismissed. Dier appealed.

Issue on Appeal. Whether Iowa law allows a putative father to bring a paternity fraud action against a biological mother to obtain reimbursement of payments that were voluntarily made.

Analysis.

Paternity Fraud. The Court defined “paternity fraud” (also known as “misrepresentation of biological fatherhood” or “misrepresentation of paternity”) as occurring when a mother makes a representation to a man that the child is genetically his own even though she is aware that he is not, or may not be, the father of the child. Some courts in other jurisdictions have disallowed paternity fraud claims based on considerations of public policy and child welfare. Those allowing the claims have determined that paternity fraud is not dissimilar from any other tort claim that is actionable as long as the elements of the tort are present. In allowing the claims, these courts have either rejected the public policy concerns or determined that discouraging paternity fraud and compensating the putative father outweigh any potential harm to the child. While courts in other jurisdictions have generally reviewed paternity fraud claims relating to court-ordered child support, the Court distinguished the present case as one in which the appellant sought reimbursement of payments made voluntarily, without a court order.

Case of First Impression—Relevant Precedent. The Court noted that recognizing a cause of action for paternity fraud was a case of first impression for the Court, although the Court had previously come close to addressing the issue. In *Brooks v. Brooks*, 680 N.W.2d 379 (Iowa Ct. App. 2004), the court of appeals found persuasive the arguments from a Nebraska Supreme Court decision (*Day v. Heller*, 653 N.W.2d 475 (Neb. 2002)) precluding a cause of action for paternity fraud based on public policy and child welfare. The court of appeals, however, declined to determine whether this cause of action should be recognized in Iowa, concluding that it is up to the legislature or the supreme court to establish new causes of action.

While Iowa does not have a statute specifically addressing paternity fraud or the reimbursement of voluntary payments made by a putative father, Iowa does have a statute addressing the relief provided an established father regarding court-ordered support payments following a disestablishment of paternity action (2011 Iowa Code, section 600B.41A).

The Court reviewed the line of cases involving the Code section and concluded that the current version of the statute limits courts to providing relief in disestablishment cases only for future and pending unpaid support due prior to the date the order determining disestablishment of paternity is filed, but not for support already paid. The conclusions in these cases rested on a long line of cases holding that courts do not have the authority under common law to reduce court-ordered support retroactively, and are thereby limited to the authorization provided in statute. This rule, the Court noted, supports the policy of protecting the stability and integrity of court judgments. The Court distinguished the present case from this line of cases, however, because Dier had provided monetary support voluntarily, not based upon a court-ordered child support decree. Additionally, in the present case, the appellant was not seeking relief under the statutory provision regarding disestablishment of paternity, but as a common law action for fraud.

Application of Common Law of Frauds. The Court next reviewed the traditional elements of common law fraud that must be proven by a preponderance of clear, satisfactory, and convincing proof: 1. The defendant making a representation to the plaintiff; 2. The representation was false; 3. The representation was material; 4. The defendant knew the representation was false; 5. The defendant intended to deceive the plaintiff; 6. The plaintiff acted in justifiable reliance on the truth of the representation; 7. The representation was a proximate cause of the plaintiff’s damages; and 8. The amount of damages.

The Court applied the necessary elements to the facts of the case and found that, with the exception of the element of damages, which would not typically provide for recovery of the costs and attorney fees resulting from the custody litigation, the petition was sufficient to set forth a traditional fraud claim. The Court noted that Dier’s cause of action did not present a new cause of action or theory of recovery, but “fit comfortably within the traditional boundaries of fraud law.” While the fact pattern may be atypical, the Court had previously allowed actions for common law fraud with atypical fact patterns. The Court stated “the common law is presumed to be in force in this state unless it is revised or repealed by statute or constitution.”

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(Legal Update—Common Law Action for Fraud Based on Misrepresentation of Paternity continued from Page 6)

Public Policy Considerations. The Court also considered Peters' claim that recognition of a cause of action for paternity fraud would be contrary to the public policy of the state. Peters' argument relied on the Day case from Nebraska as had the Iowa court of appeals in its previous decision in Brooks. While the Court agreed that the concerns expressed in Day were legitimate, when applied to the present case, the Court was not ultimately persuaded that allowing the cause of action to proceed would be contrary to public policy. The Court stated that in Day the father sought recovery of eight years of court-ordered support paid for a child that had been born during his marriage to the mother. The child in Day was 15 years old at the time of the proceedings, not 3 as the child in the present case, so advancing the cause of action was unlikely to impose additional stress on the Iowa child. Even though proceeding might result in fewer resources for Peters and the child, the Court found that it had never afforded parents a general defense against tort liability on the ground that they need the money to raise their children.

The Court also considered the public policy of ruling against allowing the cause of action to proceed. The courts recognize fraud as a cause of action to deter lying. If paternity fraud claims are allowed to proceed, situations like the present case could be avoided. In considering public policy with reference to litigation between family members in particular, the Court noted previous cases in which it had abolished interspousal immunity and parent-child immunity, finding unpersuasive the argument that this would be a threat to domestic tranquility. In the present case, the Court also found the concern about family harmony unpersuasive, especially because Dier, who thought he was part of the family, was now removed from it. Finally, the Court noted that there is a public policy to be upheld in providing a remedy for fraud by not protecting people allegedly engaging in fraud and by not using children to avoid the consequences of alleged deceptions. Based on this reasoning, the Court concluded that allowing the paternity fraud claim to advance was not contrary to public policy.

Law or Policy Expressed by the General Assembly. The Court again considered the application of Iowa Code section 600B.41A in determining whether allowing the paternity fraud claim to go forward would contravene law or policy expressed by the general assembly. The Court noted that the Code section relieves an established father from payment of future and accrued but unpaid support obligations, but by implication does not allow recovery of support that has already been paid.

While Peters did not dispute that the statute referred only to court-ordered support, she thought it incongruous to permit recoveries of voluntary support payments when the legislature had disallowed recoveries of court-ordered support payments.

The Court disagreed, stating that prior cases regarding recovery of court-ordered support were predicated on upholding the policy of protecting the stability and integrity of court judgments. In a proceeding for support, the putative father has the right to seek a paternity test, and if he does not, the decree has a measure of finality. Because the present case does not involve the finality of a decree or judgment, proceeding with the cause of action for paternity fraud does not contravene the principle of protecting the stability and integrity of court judgments.

Conclusion. The Court held that the claim for paternity fraud should not have been dismissed, is supported by common law standards for fraud, and is not contrary to public policy or the statutory policy of the state. The Court emphasized the limits of the holding, that Dier could pursue recovery of moneys provided to Peters or spent for the benefit of the child, but could not recover attorney fees and costs incurred in the prior custody litigation. The Court also cautioned that proving fraud is difficult. The Court reversed the judgment of the district court granting Peters' motion to dismiss and remanded for further proceedings.

Concurrence. Chief Justice Cady concurred specially, stating that the Court in this case continued its broader policy of recognizing a remedy for fraud. The role of the Court is to determine whether the plaintiff has established a cause of action according to the rules of notice pleading, not to decide whether it is prudent social policy to limit a common law cause of action for fraud because of the difficulty or complexity of the issues. When complex parent-child relationships are involved, the legislature is the proper authority to balance the competing policy interests and specify any exception to common law fraud based on public policy. Claims for fraud have been applied to many types of relationships of trust and confidence and proving fraud is a difficult task. Proving paternity fraud likely will be more difficult because it involves biological, emotional, and motivational complexities, and information disclosed may prove embarrassing to the parties. While the process must be trusted to strike the appropriate balance between the competing interests involved in disclosing such sensitive information, "the process may be one made better by its infrequent use."

LSA Monitor: Patty Funaro, Legislative Services Agency, Legal Division, (515) 281-3040.